RECEIVED
DEC 07 2001
LDC

COPY

Supreme Court, U.S.
FILED
NOV 28 2001
OFFICE OF THE CLERK

No. 01-301

IN THE SUPREME COURT OF THE UNITED STATES

---

ANTHONY NEWLAND, *Petitioner,*

**v.**

TONY EUGENE SAFFOLD, *Respondent.*

---

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

---

# PETITIONER'S BRIEF ON THE MERITS

---

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5158
Fax: (916) 324-2960
Counsel for Petitioner

43 pp

## QUESTION PRESENTED

Whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), the Antiterrorism and Effective Death Penalty Act's tolling provision.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| RELEVANT STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 9 |
| **I. *SAFFOLD* MUST BE REVERSED BECAUSE IT IS INCONSISTENT WITH CONGRESSIONAL INTENT AND CANNOT BE RECONCILED WITH THE POLICY CONSIDERATIONS SUPPORTING AEDPA'S STATUTE OF LIMITATIONS** | 9 |
| A. *Saffold's* Indefinite Tolling Rule | 9 |
| B. *Saffold* Undermines The Policy Considerations Supporting AEDPA's Statute Of Limitations | 19 |




## TABLE OF CONTENTS (continued)


| | Page |
|---|---|
| **II. THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE MEANING OF "PENDING" IN AEDPA'S TOLLING PROVISION, 28 U.S.C.§ 2244(d)(2), BY ESTABLISHING A UNIFORM NATIONAL RULE THAT ACCURATELY REFLECTS CONGRESSIONAL INTENT** | 36 |
| CONCLUSION | 50 |

## TABLE OF AUTHORITIES


**Page**

**Cases**

*Adams v. Woods*,
6 U.S. (2 Cranch) 336 (1805) 19

*Barnett v. Lemaster*,
167 F.3d 1321 (10th Cir. 1999) 14, 15, 23, 38, 45

*Bates v. United States*,
522 U.S. 23 (1997) 28

*Bennett v. Artuz*,
199 F.3d 116 (2d Cir. 1999),
*aff'd on other grounds*, 531 U.S. 4 (2000) 13, 38

*Beverly Community Hospital Association v. Belshe*,
132 F.3d 1259 (9th Cir. 1997) 23

*Blouin v. Headley*,
70 F.Supp.2d 221 (E.D.N.Y. 1999) 37

*Board of Regents v. Tomanio*,
446 U.S. 478 (1980) 32

*Bunney v. Mitchell*,
262 F.3d 973 (9th Cir. 2001) 43

*Caminetti v. United States*,
242 U.S. 470 (1917) 21




## TABLE OF AUTHORITIES (continued)


**Page**

*Chase Securities Corporation v. Donaldson*,
325 U.S. 304 (1945) 38

*Clemenston v. Williams*,
12 U.S. (8 Cranch) 72 (1814) 46

*Duncan v. Walker*,
121 S.Ct. 2120 (2001) 21, 28, 29

*Felker v. Turpin*,
518 U.S. 651 (1996) 19

*Fernandez v. Sternes*,
227 F.3d 977 (7th Cir. 2000) passim

*Geraci v. Senkowski*,
23 F.Supp.2d 246 (E.D.N.Y. 1998) 21

*Gibson v. Klinger*,
232 F.3d 799 (10th Cir. 2000) passim

*Green v. White*,
223 F.3d 1001 (9thCir. 2000) 37

*Griffith v. Kentucky*,
479 U.S. 314 (1987) 24

*Hamling v. United States*,
418 U.S. 87 (1974) 24

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Houston v. Lack*, 487 U.S. 266 (1988) | 4 |
| *In re Harris*, 5 Cal.4th 813 (1993) | 26 |
| *Jackson v. Dormire*, 180 F.3d 919 (8th Cir. 1999) | 37 |
| *Jolly v. Ili Lilly & Co.*, 44 Cal.3d 1103 (1988) | 34 |
| *Kaiser Found. Hosp. v. Workers Comp. Appeals Bd.*, 39 Cal.3d 57 (1985) | 34 |
| *Lexecon Inc., v. Milberg Weiss Bershad Hynes & Lerach et al.*, 523 U.S. 26 (1998) | 27 |
| *Lonchar v. Thomas*, 517 U.S. 314 (1996) | 20, 31, 47, 48 |
| *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131 (1924) | 24 |
| *McCarthy v. Madigan*, 503 U.S. 140 (1992) | 32 |
| *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1994) | 35 |




## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001) | passim |
| *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999) | 14, 15, 38, 45 |
| *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001) | 13, 25, 38, 42, 44 |
| *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) | passim |
| *Offutt v. United States*, 348 U.S. 11 (1954) | 35 |
| *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944) | 33 |
| *Painter v. Iowa*, 247 F.3d 1255 (8th Cir. 2001) | 16, 17 |
| *Patterson v. Stewart*, 251 F.3d 1243 (9th Cir. 2001) | 4 |
| *People v. Pope*, 23 Cal.3d 412 (1979) | 26 |
| *Peterson v. Gammon*, 200 F.3d 1202 (8th Cir. 2000) | 13, 38, 45 |

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) | 21 |
| *Rashid v. Khulmann*, 991 F.Supp. 254 (S.D.N.Y. 1998) | 37 |
| *Robinson v. Ricks*, 163 F.Supp.2d 155 (E.D.N.Y. 2001) | passim |
| *Rodulfa v. United States*, 461 F.2d 1240 (D.C.Cir. 1972) | 23 |
| *Romero v. Roe*, 130 F.Supp.2d 1148 (C.D. Cal. 2001) | 18 |
| *Rose v. Lundy*, 455 U.S. 509 (1982) | 44 |
| *Russello v. United States*, 464 U.S. 16 (1983) | 28 |
| *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) | 5, 10, 11, 13 |
| *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) | passim |
| *Shepherd v. Thompson*, 122 U.S. 231 (1887) | 46 |




## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Shepherd v. Thompson*, 122 U.S. 231 (1887) | 32 |
| *Smith v. United States*, 508 U.S. 223 (1993) | 21 |
| *Sorce v. Artuz*, 73 F.Supp.2d 292 (E.D.N.Y. 1999) | 37 |
| *Sumner v. Mata*, 449 U.S. 539 (1981) | 20 |
| *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000) | passim |
| *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000) | 14, 38 |
| *Teague v. Lane*, 489 U.S. 288 (1989) | 24 |
| *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001) | 16, 17 |
| *United States v. Kubrick*, 444 U.S. 111 (1979) | 33 |
| *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) | 21 |

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202 (1997) | 21 |
| *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000) | 37 |
| *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) | 6, 7, 18 |
| *Williams v. Taylor*, 529 U.S. 420 (2000) | 21, 29 |
| *Wood v. Carpenter*, 101 U.S. 135 (1879) | 32 |




## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| **Statutes** | |
| 28 U.S.C. | |
| § 1254(1) | 2 |
| § 2244(d) | 2, 5, 12, 29, 31 |
| § 2244(d)(1)(A) | 24, 41 |
| § 2244(d)(1)(B) | 31 |
| § 2244(d)(1)(D) | 30, 34 |
| § 2244(d)(2) | passim |
| § 2254 | 5, 19 |
| § 2263 | 3 |
| **Court Rules** | |
| California Rules of Court rule 24 | 43 |
| **Other Authorities** | |
| Black's Law Dictionary, 6th ed. P. 1134 (1990) | 24 |
| *The Habeas Hagioscope*, 66 Southern California Law Review 2331 (1993) | 20, 39 |
| *The Puzzling Purposes of Statutes of Limitation*, 28 Pacific Law Journal 453-514 (1997) | 32-35, 38 |

**TABLE OF AUTHORITIES (continued)**


| | Page |
|---|---|
| U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989) | 35 |




**IN THE SUPREME COURT OF THE UNITED STATES**

No. 01-301

---

ANTHONY NEWLAND, *Petitioner,*

**v.**

TONY EUGENE SAFFOLD, *Respondent.*

---

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Saffold v. Newland* (hereafter "*Saffold*") and the order denying the petition for rehearing and suggestion for rehearing en banc are reported at 250 F.3d 1262 (9th Cir. 2001) and are reprinted in Appendix A to the Petition for Writ of Certiorari. *Saffold* amended and superceded the Ninth Circuit's July 17, 2000, opinion reported at 224 F.3d 1087 (9th Cir. 2000), which is reprinted in Appendix B to the Petition for Writ of Certiorari. The district court's February 25, 1999, order granting a certificate of appealability is reprinted in Appendix D to the Petition for Writ of Certiorari. The district court's January 6, 1999, order adopting the findings and recommendations of the magistrate judge is reprinted in Appendix E to the Petition for Writ of Certiorari, and the November 3, 1998, findings and recommendations of the magistrate judge are reprinted in Appendix F to the Petition for Writ of Certiorari.

## JURISDICTION

On May 23, 2001, the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") entered its judgment in *Saffold* and denied rehearing and rehearing en banc. On August 20, 2001, Anthony Newland filed a petition for writ of certiorari in this Court, and certiorari was granted on October 15, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the non-capital judgment of a state court:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or



> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2263 sets forth the following time requirements and tolling rules for death-penalty cases:

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled–
>
> (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> (3) during an additional period not to exceed 30 days, if –
>
> (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas

corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

## STATEMENT OF THE CASE

On April 3, 1990, Respondent was found guilty in California state court of murder, assault with a deadly weapon, two counts of robbery, and findings of firearm use associated with the murder and robberies. His conviction became final on April 20, 1992.

On April 17, 1997, seven days before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) one-year statute of limitations would have expired,[1] Respondent filed his first state petition for writ of habeas corpus with the San Joaquin County Superior Court by delivering the petition to prison authorities.[2] The petition was denied by the San Joaquin County Superior Court on June 9, 1997.

On June 14, 1997, Respondent delivered a petition for writ of habeas corpus to prison authorities to be filed with the California Court of Appeal, Third Appellate District. The petition was filed on June 17, 1997, and denied by the Third Appellate District on June 26, 1997.

---

1. In *Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001), the Ninth Circuit joined all other circuits which have considered the issue and held that "AEDPA's one-year grace period for challenging convictions finalized before AEDPA's enactment date is governed by Rule 6(a) and ended on April 24, 1997 in the absence of statutory tolling."

2. Petitioner does not contest *Saffold*'s holding that the mailbox rule set forth by this Court in *Houston v. Lack*, 487 U.S. 266, 276 (1988), applies to habeas petitions filed under the AEDPA and applies, "for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling." *Saffold*, 250 F.3d at 1268.



On November 13, 1997, after waiting over four and one-half months, Respondent filed a petition for writ of habeas corpus with the California Supreme Court, which denied the petition on May 27, 1998, "on the merits and for lack of diligence." (Pet. App. G.)

On June 4, 1998, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento). The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On August 28, 1998, Petitioner filed a motion to dismiss on the ground that Respondent's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d).

On November 3, 1998, the magistrate judge filed his findings and recommendations that Petitioner's motion to dismiss be granted and that the case be closed. (Pet. App. F.)

On January 6, 1999, the district court adopted the findings and recommendations in full, granted Petitioner's motion to dismiss and ordered the case dismissed. (Pet. App. E.)

On February 25, 1999, the district court granted a certificate of appealability limited to the issue of whether Respondent's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)." (Pet. App. D.)

On July 17, 2000, the Ninth Circuit filed *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) reversing the district court's dismissal of the case. (Pet. App. B.)

On July 31, 2000, Petitioner filed a petition for rehearing and suggestion for rehearing en banc.

On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc, and filed *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), which amended and superceded the July 17, 2000, opinion. (Pet. App. A.)

On June 4, 2001, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Pet. App. C.)

On August 20, 2001, Petitioner Anthony Newland's petition for writ of certiorari was filed with this Court.

On October 15, 2001, this Court granted certiorari.

## SUMMARY OF ARGUMENT

Seven days before the one-year AEDPA statute of limitations period ended and five years after his state court direct appeal became final, Respondent filed his first state habeas corpus petition in superior court alleging ineffective assistance of counsel. After the state appellate court summarily denied his second state petition for habeas corpus alleging ineffective assistance of counsel, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

Although the California Supreme Court's finding of "lack of diligence" established that Respondent failed to properly pursue his state collateral remedies under California law, the question remaining to be answered in the instant case is whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision.

In reversing the district court's dismissal of Respondent's federal application for writ of habeas corpus as untimely under AEDPA's statute of limitations, *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) established an indefinite tolling rule that was later confirmed in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). *Saffold's* indefinite tolling rule provides that, if the California Supreme Court addresses a petition for writ of habeas corpus on the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the state supreme court's denial of the habeas petition, including all gaps between the filing of



the state petitions. As explained in *Welch*, "*Saffold* turned, not on the length of the time gap between petitions, but on the fact that the California Supreme Court had addressed Saffold's petition on the merits." *Id.* at 1016.

*Saffold's* indefinite tolling rule must be reversed because it is inconsistent with congressional "intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). As noted by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000), *Saffold's* "understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect" because under *Saffold*, "if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits."

Statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), establishes that *Saffold's* indefinite tolling rule is contrary to congressional intent and that it undermines the policy judgments made by Congress when it enacted AEDPA's statute of limitations. Such analysis supports the conclusion that Congress intended to adopt the "ordinary or natural" meaning of the word "pending" ("remaining undecided"; "awaiting decision"; "not yet decided") rather than a more expansive definition that would support *Saffold's* indefinite tolling rule. Congress did not intend to allow tolling during the gaps between the rendering of a decision on a habeas corpus application and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims because to do so would promote delay on the part of the petitioner by permitting tolling for gaps between levels of state review that happen to be permissible under state procedural laws or rules. Such state procedural laws and rules cannot be allowed to define the acceptable time frame for the

federal statute of limitations. Congress specifically provided for a defined time period which is intended to provide an incentive for diligent behavior on the part of the petitioner. To allow additional tolling based upon time periods permitted under state law would open the door for state procedural laws and rules to in effect trump the federal statute of limitations.

Statutory interpretation of the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), also supports the conclusion that the line of circuit court cases providing for tolling during the gaps between tiers of state collateral review also have improperly expanded tolling beyond the intent of Congress, although to a lesser degree than *Saffold*. The circuit courts have ignored or discounted the legislative history and statutory language which strongly supports the conclusion that Congress intended to adopt the ordinary or natural meaning of the word pending and did not intend to allow tolling during the gaps between the rendering of a decision and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims. Furthermore, the circuit court decisions have created confusion because they are in conflict with each other, and their rejection of the view that the time between a state court's decision denying an application for habeas corpus relief and a subsequent properly filed application for state habeas corpus relief does not toll the statute of limitations (hereafter the "gap theory") has created the potential for widely divergent grants of tolling due to the diversity of state procedural rules and statutes.

This Court should resolve the conflict over the meaning of "pending" in AEDPA's tolling provision 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent. Petitioner submits that the gap theory most accurately reflects the intent of Congress. By recognizing that the gap theory most accurately represents congressional intent to toll the statute of limitations only when properly filed applications are pending before a state court and not during the period following decision at one level and the



filing of an application for review at another level, this Court can prevent the lower federal courts from diluting Congress's power to define the proper scope of the writ of habeas corpus and can provide a uniform national rule that reflects the intent of Congress.

## ARGUMENT

### I.

### *SAFFOLD* MUST BE REVERSED BECAUSE IT IS INCONSISTENT WITH CONGRESSIONAL INTENT AND CANNOT BE RECONCILED WITH THE POLICY CONSIDERATIONS SUPPORTING AEDPA'S STATUTE OF LIMITATIONS

### A. *Saffold's* Indefinite Tolling Rule

Five years after his state court direct appeal became final, and seven days before the one-year AEDPA statute of limitations period expired, Respondent filed his first state habeas corpus petition in superior court (alleging ineffective assistance of counsel). Five days after the superior court denied his petition on the merits, Respondent filed the identical petition with the state appellate court by delivering the petition to prison authorities. Following a summary denial of the petition by the state appellate court, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

After Respondent's federal application for writ of habeas corpus was dismissed as untimely under AEDPA's statute of limitations, the Ninth Circuit reversed the district court and held that, when a California Supreme Court ruling

dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition, including gaps between the filing of the petitions. Pet. App. A at 8-13; *Saffold*, 250 F.3d at 1265-1268; Pet. App. B at 6-10; 224 F.3d at 1088-1091.

Although the California Supreme Court's finding of "lack of diligence" established that Respondent failed to properly pursue his state collateral remedies under California law, the question remaining to be answered in the instant case is whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision. After recognizing the California Supreme Court's finding of Respondent's "lack of diligence," the majority opinion in *Saffold* expressed its concern that the California Supreme Court's

> order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.

Pet. App. A at 11-12; *Saffold*, 250 F.3d at 1267; Pet. App. B at 9-10; 224 F.3d at 1090.

Judge O'Scannlain's dissenting opinion in *Saffold* argued that, "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Pet. App. A at 15; *Saffold*, 250 F.3d at 1269; Pet. App. B at 12-13; 224 F.3d at 1091-1092. Judge O'Scannlain explained that:



Under any method of review, Saffold's delay falls substantially outside the period that *Nino*[3] tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?[4]

Pet. App. A at 17; *Saffold*, 250 F.3d at 1270; Pet. App. B at 14; 224 F.3d at 1092.

---

3. *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).

4. Although Petitioner agrees with Judge O'Scannlain that AEDPA's tolling provision does not apply to "periods of excessive delay between the three separate habeas petitions," Petitioner submits that the interpretation of AEDPA's tolling provision that most accurately reflects congressional intent would deny tolling for any delay between filings that can be attributed to the habeas corpus petitioner. As discussed, *infra*, statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), establishes that Congress intended to adopt the "ordinary or natural" meaning of the word "pending" ("remaining undecided"; "awaiting decision"; "not yet decided") rather than a more expansive definition that would support *Saffold's* indefinite tolling rule or *Nino's* rejection of the gap theory.

Although the *Nino* court held "that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge" (*id.* at 1006), the *Nino* court qualified the holding by concluding "that, for purposes of § 2244(d), the time must be tolled for the entire period in which a petitioner is **appropriately pursuing** and exhausting his state remedies." *Id.* at 1004, emphasis added. The *Nino* court explained that:

> Because the statute of limitations was tolled during the period in which Nino was **properly pursuing** his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely. . . . On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals [sic]; that petition was denied on May 1, 1997. On May 20, 1997, he filed a petition with the California Supreme Court, which was denied on August 27, 1997. Because he was **properly pursuing** his state collateral remedies,[FN4] AEDPA's statute of limitations was tolled until the California Supreme Court denied his petition for review of the court of appeals' [sic] denial of his habeas petition.

*Id.* at 1006-1007, emphasis added. In footnote 4, the *Nino* court noted that:

> [W]e express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims. *See In re Robbins*, 959 P.2d 311, 317-18 (Cal.1998); *In re*



> *Clark*, 855 P.2d 729, 745 (Cal.1993). . . .

*Nino* at 1006, fn. 4.

By eviscerating footnote 4 of *Nino* (thereby eliminating *Nino's* requirement that a petitioner be "**appropriately pursuing** and exhausting his state remedies" in order to be allowed tolling under AEDPA), the majority opinion in *Saffold* has improperly diluted the statute of limitations imposed by Congress by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). In short, *Saffold* allows tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim. Pet. App. A at 11-13; *Saffold*, 250 F.3d at 1267-1268; Pet. App. B at 9-10; 224 F.3d at 1090.

*Saffold*'s expansion of tolling to include such lengthy dilatory behavior has resulted in a circuit conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits over the question of whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2), AEDPA's tolling provision.[5]

---

5. In addition to the conflict between *Saffold* and the aforementioned circuits, a conflict also exists among the circuits that have rejected the gap theory, and those circuits have left a number of unresolved issues posed by widely divergent state procedural rules which will be discussed *infra* in Argument II. *See, e.g., Nara v. Frank*, 264 F.3d 310, 314-319 (3d Cir. 2001); *Melancon v. Kaylo*, 259 F.3d at 405-407; *Gibson v. Klinger*, 232 F.3d at 803-807; *Fernandez v. Sternes*, 227 F.3d 977, 978-981 (7th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417, 420-424 (3d Cir. 2000); *Peterson v. Gammon*, 200 F.3d 1202, 1203-1205 (8th Cir. 2000); *Bennett v. Artuz*, 199 F.3d 116, 119-120 (2d Cir. 1999), *aff'd on other grounds*, 531

The majority opinion in *Saffold* has been severely criticized by the Seventh Circuit's opinion in *Fernandez v. Sternes*, 227 F.3d 977. The *Fernandez* court stated that:

> The ninth circuit did not explain [in *Saffold*] how time during which no collateral attack is pending in state court may be deemed time "during which a properly filed application for State . . . collateral review . . . is pending"; *Saffold* does not analyze the language of § 2244(d)(2) . . . . All the majority said for itself is that *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), supported its conclusion. But *Nino* presents a different issue: is time following an appellate court's decision, and preceding a timely application for discretionary review, excluded from the calculation under § 2244(d)(2)? *Nino*'s affirmative answer, with which we agree [citations omitted], does not establish that an untimely request receives the same treatment. It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. Under the majority's approach in *Saffold*, if a prisoner let ten

---

U.S. 4 (2000); *Mills v. Norris*, 187 F.3d 881, 882-884 (8th Cir. 1999); *Taylor v. Lee*, 186 F.3d 557, 560-561 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000); *Nino v. Galaza*, 183 F.3d at 1004-1007; *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). In Argument II, *infra*, Petitioner requests that this Court resolve the circuit conflict over the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent.



> years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect.
>
> *Saffold*'s approach also would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time. . . . *Saffold* implements a make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing. We prefer reality. An untimely petition is just that; it is filed when it is filed, and it was not "pending" long before its filing. We decline to follow *Saffold*. (Because this decision creates a conflict among the circuits, it was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge requested a hearing en banc.)

227 F.3d at 980-981, italics in original; *accord*, *Melancon v. Kaylo*, 259 F.3d at 407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."].

Resolution of the issue presented in this case (whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. § 2244(d)(2)) is a matter of federal law. *Gibson v. Klinger*, 232 F.3d at 806; *Mills v. Norris*, 187 F.3d at 883; *Barnett v. Lemaster*, 167 F.3d at 1323. Although the federal courts may be guided by state procedural law in determining the meaning of "pending" under federal law, Petitioner submits that the determination does not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state procedural rule or statute. For example, federal courts have held that AEDPA's one-year

statute of limitations is not trumped by a state's more generous statute of limitations. *Tinker v. Moore*, 255 F.3d 1331, 1334-1335 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001) [affirming dismissal of federal petition as time barred under AEDPA's statute of limitations and rejecting argument by defendant that § 2244(d)(2) should be construed "to toll the statute of limitations during the entire three years allowed under Iowa law to apply for post-conviction relief because exhaustion of state remedies is a prerequisite for federal habeas relief and because principles of comity so demand."].

In *Tinker*, the Eleventh Circuit rejected the argument that AEDPA's statute of limitations forced the defendant to choose between exercising his right to meaningful access to the state courts under Florida's two-year limitation period and his right to petition for federal habeas relief. The *Tinker* court explained that:

> [W]e reject Tinker's "impermissible choice" argument. By virtue of statute, Tinker is provided both a state and federal forum in which to seek post-conviction relief. Despite his argument to the contrary, he need not forego his state remedy entirely in order to avail himself of the federal remedy. However, he must exercise it within one year of the date his judgment became final and do so in a manner that leaves him sufficient time to timely file his federal petition.

255 F.3d at 1334-1335.

Petitioner submits that the *Saffold* opinion is fundamentally flawed because of its misguided focus on "deference" to the California Supreme Court's decision to address the merits and because it refuses to address the fact that resolution of the meaning of "pending" under AEDPA's statute of limitations involves a question of federal law (determining the intent of Congress) rather than the application of procedural



bar case law (to determine whether federal courts should give deference to state procedural bars that may or may not be grounded on an independent and adequate state ground). As noted in *Tinker*, state prisoners, by statute, are "provided both a state and federal forum in which to seek post-conviction relief." 255 F.3d at 1334. The mere fact that a state is willing to entertain habeas corpus claims well beyond AEDPA's one-year statute of limitations (by way of its own more generous statute of limitations or by way of a state court's willingness to entertain a claim on the merits despite inordinate delay) should not be allowed to trump congressional intent to "encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407; *see Tinker v. Moore*, 255 F.3d at 1334-1335; *Painter v. Iowa*, 247 F.3d at 1256.

For example, if the state of California decided to enact a statute of limitations which provided that state prisoners had two years within which to file an original petition in the appellate court following a superior court denial of a prior petition and another two years to file an original petition in the state supreme court following denial by the state appellate court, surely federal courts should not allow such a state statute to effectively override congressional intent by ruling that AEDPA's one-year statute of limitations must be tolled for an additional four years out of deference to the state statute of limitations. The fact that AEDPA's federal statute of limitations might require state prisoners to raise their state claims earlier than they would be required to file under state law does not deprive them of either their state or federal remedy. If a state prisoner wishes to exercise both his state and federal remedies, he must exercise his state remedy within one year of the date his judgment became final (plus congressionally sanctioned tolling) and do so in a manner that leaves him sufficient time to timely file his federal petition. 255 F.3d at 1334-1335.

*Saffold's* interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations by allowing indefinite tolling as long as a state court addresses the merits. The *Fernandez* court correctly stated that "[u]nder the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits." 227 F.3d at 980; *accord*, *Melancon v. Kaylo*, 259 F.3d at 406-407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."]. As explained by the court in *Romero v. Roe*, 130 F.Supp.2d 1148 (C.D. Cal. 2001), the *Saffold* decision was not based on

> temporal considerations. Rather, what made the four-month delay inconsequential was the fact that the state court decided, at least in part, the tardily-filed petition on the merits. . . . It was not the particular length of the delay that was crucial to the court's decision, but rather how the state court treated the tardily-filed petition.

130 F.Supp.2d at 1150.

The view that *Saffold* permits indefinite tolling has recently been confirmed by the Ninth Circuit in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). In *Welch*, the district court dismissed a state prisoner's federal habeas petition for failing to satisfy AEDPA's one-year statute of limitations because he waited almost four and a half years after the state superior court's March 17, 1994, denial of his first state petition before he filed an original petition on different grounds in the California Supreme Court on August 22, 1998. In *Welch*, the Ninth Circuit stated that "[o]ur decision in *Saffold* turned, not on the length of the time gap between petitions, but on the fact that the California Supreme Court had addressed Saffold's



petition on the merits." *Id.* at 1016. The *Welch* court then explained that Welch's four and one-half year delay in filing did not defeat tolling under AEDPA because under the controlling authority of *Saffold* "the California Supreme Court's order denying Welch relief without comment or citation constituted a denial on the merits." *Id.* at 1017.

In a concurring opinion, Judge Gould stated that he was "concerned that the application of the rule of *Saffold* here operates substantially to frustrate the intent of Congress in imposing a one-year limitations period for state prisoners filing federal petitions for habeas corpus in AEDPA." *Id.* at 1018. He further stated that "*Saffold* leaves us" with the problem "that there is in effect no time limit whatsoever on state court proceedings" and that *Saffold* provides "no apparent way to resolve it." *Id.* at 1018-1019.

### B. *Saffold* Undermines The Policy Considerations Supporting AEDPA's Statute Of Limitations

Nearly two centuries ago, John Marshall recognized that a claim that could be "brought at any distance of time . . . would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.). Petitioner submits that *Saffold's* indefinite tolling rule surely must be repugnant to the members of Congress who enacted AEDPA's statute of limitations and whose policy judgments have been severely undermined by *Saffold*.

In *Felker v. Turpin*, 518 U.S. 651, 662 (1996), this Court recognized that several sections of AEDPA "impose new requirements" for granting habeas corpus relief under 28 U.S.C. § 2254. *Felker* reiterated that:

> [W]e have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4

> Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

518 U.S. at 664; *cf. Sumner v. Mata*, 449 U.S. 539, 548, fn. 2 (1981) [recognizing this Court's duty to ensure that the federal courts do not exceed their jurisdiction and stating that "the 1966 amendments embodied in section 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction"].

In *Lonchar v. Thomas*, 517 U.S. 314 (1996), this Court stated that:

> Congress, the Rule writers, and the courts have developed . . . procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts' freedom to issue the writ . . . while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the "finality" of its own legal processes. [Citations omitted.] These legal principles are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make . . . .

517 U.S. at 322-323. Even Professor Larry W. Yackle, a leading proponent of expanding the scope of the writ of habeas corpus whose work was cited by this Court in *Lonchar*, has recognized that this Court "should . . . defer to the policy judgments made by the legislative branch." Larry W. Yackle, *The Habeas Hagioscope*, 66 Southern California Law Review 2331, 2333 (1993). In the instant case, it is necessary to



undertake statutory interpretation of the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), to determine whether *Saffold's* indefinite tolling rule is contrary to congressional intent and to determine whether *Saffold* undermines the policy judgments made by Congress when it enacted AEDPA.

In *Duncan v. Walker*, 121 S.Ct. 2120, 2124 (2001), this Court explained that "[o]ur task is to construe what Congress has enacted. We begin, as always, with the language of the statute." *Id.* at 2124; *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989) quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This Court gives "the words of a statute their '"ordinary, contemporary, common meaning,"' absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. at 431, quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997) and *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993).

Congress did not provide a definition of the term "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). However, the word has a common meaning among lawyers, judges and the general public. Litigation concerning a legal issue or claim (here an application for state collateral review concerning a claim of ineffective assistance of counsel) is considered "pending" when it remains undecided, awaiting decision. *Robinson v. Ricks*, 163 F.Supp.2d 155, 164 (E.D.N.Y. 2001); *see Geraci v. Senkowski*, 23 F.Supp.2d 246, 252 (E.D.N.Y. 1998) ["the word 'pending' in § 2244(d)(2) has an unambiguous meaning: a motion is pending if it has been filed with the Court but has yet to be decided"], *aff'd*, 211 F.3d

6 (2d Cir.), *cert. denied*, 531 U.S. 1018 (2000).[6] It follows that when an application for state post-conviction or other collateral review is denied, "it is no longer considered pending in the court that denied it. Nor is an appeal from such a denial generally considered pending until the application for leave to appeal is filed." *Robinson v. Ricks*, 163 F.Supp.2d at 164.

Furthermore, the commonly understood meanings of the term "pending"

> are consistent with the dictionary definitions to which courts often turn in the absence of a legislative definition. *See, e.g., MCI Telecommunications Corporation v. American Telephone and Telegraph Co.*, 512 U.S. 218, 225 (1994) . . . . Black's Law Dictionary defines "pending" as "[r]emaining undecided; awaiting decision." *Black's Law Dictionary* 1154 (7th ed. 1999). Other dictionaries define the term similarly. *See Webster's Third New International Dictionary* 1669 (1993) ("not yet decided: in continuance: in suspense"); *The Random House Dictionary of the English Language* 1065 (1966) ("remaining undecided; awaiting decision or settlement; unfinished"); *The Oxford English Dictionary* Vol. XI, at 468 (2d ed.1989) ("[r]emaining undecided, awaiting decision or settlement).
>
> Thus, a commonsense reading of the word "pending" in § 2244(d)(2) requires the conclusion that [an application for state post-conviction or other collateral review] is pending while it is before a court awaiting decision. To construe the term otherwise, that is, to say that a post-conviction motion remains "pending" even where there is no undecided application before any court, would distort the plain meaning of the term.

6. It is apparent that Respondent Saffold himself understood "pending" to mean undecided given his response to question 17 on each of his state petitions for habeas corpus. *See* Joint Appendix at 15 (superior court petition), Joint Appendix at 28 (court of appeal petition), and Joint Appendix at 39 (state supreme court petition) where in response to question 17 ("Do you have any petition, appeal, or other matter pending in any court?") Respondent Saffold answered: "No."



*Robinson v. Ricks*, 163 F.Supp.2d at 164.

Nevertheless, the circuit courts have chosen to construe the term "pending" more broadly. In *Barnett v. Lemaster*, the Tenth Circuit concluded that "pending"

> must be construed more broadly to encompass all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Such a construction comports with the generally-accepted definition of the term. *See, e.g., Beverly Community Hosp. Assoc. v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997) (statutory reference to "pending" lawsuits encompasses not only undecided cases at district court level but also cases pending on appeal), *cert. denied*, — U.S. —, 119 S.Ct. 334, 142 L.Ed.2d 276 (1998); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir. 1972) ("suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice").

167 F.3d at 1323. However, *Beverly Community Hospital Association v. Belshe*, 132 F.3d 1259 (9th Cir. 1997) and *Rodulfa v. United States*, 461 F.2d 1240 (D.C.Cir. 1972), the cases relied on by *Barnett* for a broader definition of "pending," both involved the issue of whether changes in the law made after a lower court decision but before finality on appeal may nevertheless apply to lawsuits still pending on appeal. The

well-established answer is that such changes in the law may apply to lawsuits which have not yet become final on appeal. *Hamling v. United States*, 418 U.S. 87, 101-102 (1974) ["Since the judgment in this case has not become final, we examine the judgment against petitioners in the light of the principles laid down" in prior decisions establishing "a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."]; *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-143 (1924) ["An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of."].

The statute at issue here involves collateral litigation following finality of direct review rather than lawsuits that have not become final on appeal. AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), concerns applications for state post-conviction or other collateral review that necessarily are filed after a judgment has become "final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner submits that the long line of cases construing lawsuits to be "pending" until finality of appeal are inapposite to litigation concerning habeas corpus applications which necessarily are pending and decided after finality on direct appeal. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) [federal habeas relief will be unavailable if the claim rests on a "new rule" which was announced or would be created after petitioner's state appeal]; *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987) [finality is defined as the expiration of the time within which to petition for writ of certiorari on direct review]. Consequently, circuit courts have erred by relying on a broad definition of pending such as that set forth in

> Black's Law Dictionary, 6th ed. P. 1134 (1990) defin[ing] "pending" as,
>
> > [b]egun, but not yet completed; during; before the conclusion of; prior to the



> > completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is "*pending*" from its inception until the rendition of *final judgment*. An action is "pending" after it is commenced by either filing a complaint with the court or by the service of a summons. (emphasis added).

*Swartz v. Meyers*, 204 F.3d at 421; *Nara v. Frank*, 264 F.3d at 317. Although *Swartz v. Meyers*, 204 F.3d at 421 correctly concluded that the quoted "definition reflects the term's common usage," it is a common usage for an area of law (a suit or case "'pending' from its inception until the rendition of *final judgment*") which is quite distinct from the legal setting in the present case, which concerns collateral review **after** final judgment.

The inappropriateness of applying the broader definition of pending to post-conviction or other collateral review becomes especially apparent when it is applied to collateral review in California. In California, the supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. *See*, *Nino*, 183 F.3d at 1006, fn.2. Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeal. *Id.* If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *Id.* at 1006, fn.3. Although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.*[7] Given

---

7. Under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or

that superior court denials of habeas corpus relief are non-appealable, it is apparent than nothing can be pending between the denial of a habeas petition in the superior court and the filing of an original petition in the court of appeal. Similarly, if a petitioner files an original petition in the state supreme court rather than a petition for review, nothing is pending between the denial by the appellate court and the filing of the original petition in the supreme court.

Although application of AEDPA's statute of limitations to petitioners attempting to exhaust their claims under California's collateral review process might appear to be harsh, the system in fact provides the petitioner with the opportunity to timely exhaust his state remedies even though he has not been particularly diligent with regard to the one-year period granted by Congress. A California petitioner such as Respondent Saffold, whose lack of diligence has used up most of the one-year statute of limitations period, has the option of by-passing the superior and/or appellate courts and instead filing his original petition directly with the California Supreme Court. Item number 18 on California's standard petition for writ of habeas corpus form states: "If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court." Joint Appendix at 16, 29 and 39. Respondent Saffold could have filed directly in the supreme court stating in response to item number 18 on the standard form that he was applying directly to the supreme court without filing first in the lower courts to facilitate exhaustion of his state claims prior to filing his federal petition within the one-year federal statute of limitations.

---

counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993). Claims of ineffective assistance of counsel "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, fn. 17 (1979).



The conclusion that 28 U.S.C. § 2244(d)(2) was not intended to toll the limitations period during the interval between the denial of an application for post-conviction relief and the filing of an appeal (or application seeking leave to appeal, motion for belated appeal, motion for reconsideration or rehearing, motion for extension of time to appeal, *nunc pro tunc* motion, etc.) from such a denial is strongly supported by the structure of the statute as a whole. *Robinson v. Ricks*, 163 F.Supp.2d at 164-165; *see Lexecon Inc., v. Milberg Weiss Bershad Hynes & Lerach et al.*, 523 U.S. 26, 36 (1998) ["[A] statute is to be considered in all its parts when construing any one of them."]. First, as explained by the court in *Robinson*,

> a comparison of the provision with another tolling provision in AEDPA reveals that if Congress had intended to include the entire state post-conviction relief process, including gaps like the one at issue here, in the period tolled pursuant to § 2244(d(1)(A), it knew precisely how to do so. Section 2263(b)(2) is the death-penalty counterpart to § 2244(d)(2), tolling the statute of limitations applicable to federal habeas petitions that challenge capital convictions. The limitations period applicable to such petitions is tolled not merely while applications for state post-conviction review are "pending," but rather "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2). The different language in § 2244(d)(2) indicates that Congress did not intend the statute of limitations in non-capital cases [or capital cases in states that did not qualify under or opt in to Chapter 154 provisions] to be tolled during the entire post-conviction review process, but rather only when such proceedings were actually pending before a state court.

*Robinson v. Ricks*, 163 F.Supp.2d at 165; *see Duncan v. Walker*, 121 S.Ct. at 2124 ["a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned "Federal" review expressly"]; *id.* at 2125 quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) and *Russello v. United States*, 464 U.S. 16, 23 (1983) [""[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.""].

Second, as explained by the court in *Robinson*,

> a comparison of § 2244(d)(1)(A), which in this case determines when the limitations period commences, and § 2244(d)(2), which provides for its tolling, supports the conclusion that Congress did not intend § 2244(d)(2) to toll the limitations period during the intervals between the various stages of the post-conviction review process. Under § 2244(d)(1)(A), a state court "judgment" becomes "final," and the one-year period commences, on "the conclusion of direct review or the expiration of the time within which direct review might be sought." Thus, the mere availability of judicial review will prevent a judgment from becoming final, and delay the onset of the limitations period, even if no such proceeding is actually commenced. This stands in sharp contrast to § 2244(d)(2), which tolls the period once it has commenced only while a properly filed "application" for collateral review is "pending." In effect, Robinson's proposed interpretation of § 2244(d)(2) imports into that provision, to define when state collateral review is "pending," the part of § 2244(d)(1) that defines when direct review becomes final–that is, it would define "pending" to include not only the period in which the application for collateral review remained undecided, but also further periods, as long as the time for seeking review of an adverse decision has not expired.



*Robinson v. Ricks*, 163 F.Supp.2d at 165.

Finally, the straightforward construction of the term "pending" set forth by the court in *Robinson v. Ricks* is consistent with AEDPA's purpose and policy. In *Williams*, this Court recognized "AEDPA's purpose to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. at 436. In *Duncan*, this Court recognized AEDPA's "clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review" and stated that "[s]ection 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions **as soon as possible**." *Duncan v. Walker*, 121 S.Ct. at 2129, italics in original, emphasis added.

AEDPA's legislative history supports the conclusion that Congress drafted 28 U.S.C. § 2244(d) to strongly encourage diligent pursuit of state remedies by tolling the statute of limitations only for the time during which a properly filed application for state post-conviction or other collateral review was actually under consideration by a state court.

The House Report on AEDPA states:

> [T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. . . . To help accomplish [this] purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U.S.C. section

> 2254. . . . This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.

H.R.Rep. No. 104-23, at 29 (1996). Limiting the tolling provision to periods when state post-conviction applications remain undecided by the state courts, *i.e.*, excluding from its coverage potentially lengthy gaps between levels of state court review, will encourage the diligent pursuit of remedies in those courts. In turn, that will curb delays in state post-conviction litigation and accelerate the federal habeas process. *See Duncan*, 121 S.Ct. at 2128 ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.") (citation omitted).

*Robinson v. Ricks*, 163 F.Supp.2d at 165-166. At the same time, AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), promotes comity by tolling all time during which state courts are considering properly filed applications for collateral relief.

Congress drafted AEDPA's statute of limitations in a manner that promotes finality, comity and diligence on the part of the habeas corpus petitioner. In doing so, Congress took care to protect the rights of habeas corpus petitioners. AEDPA's statute of limitations will not begin to run until the petitioner could have discovered through the exercise of due diligence the factual predicate of the claims presented (*see* § 2244(d)(1)(D)),



and the petitioner is protected from interference by the state by § 2244(d)(1)(B) which provides that if an impediment to filing an application is created by State action in violation of the Constitution or laws of the United States, the limitation period shall not begin to run until the date on which the impediment to filing created by such State action is removed. This provides a strong incentive for the states to facilitate the smooth filing of applications for collateral relief. Given these protections, 28 U.S.C. § 2244(d) reasonably requires petitioners to act diligently by either filing early within the one-year period in order to avoid concern over time lost between different levels of state court collateral review or, in the event that a petitioner has wasted a large chunk of his time prior to filing his first state application, to be especially diligent in order to minimize or eliminate the gaps between those levels of review.

Petitioner submits that Congress did not intend to promote delay on the part of the petitioner by permitting tolling for gaps between levels of state review that happen to be permissible under state procedural laws or rules providing varying periods to timely file appeals, motions for rehearing, motions for extension of time, or petitions for review under state law. Such state procedural laws and rules cannot be allowed to define the acceptable time frame for the federal statute of limitations. Congress has specifically provided for a defined time period (a full year plus 90 days for certiorari) which is intended to provide an incentive for diligent behavior on the part of the petitioner while at the same time protecting him from events outside of his control. To allow additional tolling based upon time periods permitted under state law would open the door for state procedural laws and rules to in effect trump the federal statute of limitations.[8/]

---

8. It should be noted that in *Lonchar*, this Court recognized that:

> Even in an area, such as exhaustion, where judges have considerable discretionary authority, "appropriate

Analysis of the policy considerations supporting AEDPA's statute of limitations reinforces the conclusion that Congress intended to adopt the "ordinary or natural" meaning of "pending" in 28 U.S.C. § 2244(d)(2) and did not intend to allow tolling during the gaps between the rendering of a decision on a habeas corpus application and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims.[9] In *Wood v. Carpenter*, 101 U.S. 135 (1879), this Court stated that "[s]tatutes of limitation . . . promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. . . . Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Id.* at 139; *Shepherd v. Thompson*, 122 U.S. 231, 236 (1887) ["The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost."].

In *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), this Court addressed the importance of ensuring accurate fact-finding by minimizing the deterioration of evidence as follows:

> deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme[.]"

517 U.S. at 327-328, quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

9. The following discussion of policy considerations relies heavily on Tyler T. Ochoa's and Andrew J. Wistrich's article, *The Puzzling Purposes of Statutes of Limitation*, 28 Pacific Law Journal 453-514 (1997)(hereafter "Ochoa & Wistrich").



> [T]he finding of ultimate facts . . . is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

*Id.* at 487; *see United States v. Kubrick*, 444 U.S. 111, 117 (1979) [statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"]; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944) ["Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."].[10]

Individuals other than the parties, such as witnesses, jurors, victims and victims' family members also benefit from statute of limitations. Such individuals can benefit from a reduction in uncertainty brought about by the statute of limitations' promotion of finality. Witnesses

> may have their peace of mind disrupted by long-outstanding claims. Those who have witnessed an occurrence involving potential wrongdoing are faced with the possibility that they may be called to testify. For some, the prospect of testifying causes only minor

10. It also should be noted that prompt enforcement of substantive law results in greater deterrence of wrongdoing and that "inaccurate adjudication decreases deterrence." Ochoa & Wistrich at 473, 492.

> annoyance; for others, it is anticipated with great dread. Relatively few people, and almost none who have testified previously, relish the thought.

Ochoa & Wistrich at 462. In federal habeas corpus litigation involving allegations of juror misconduct, jurors are likely to find themselves in the same position as other witnesses as they are called upon for declarations and for testimony at evidentiary hearings years after the trial.

In addition to promoting repose by protecting parties from defending stale claims, "[a] second policy underlying the statute [of limitations] is to require plaintiffs to diligently pursue their claims." *Jolly v. Ili Lilly & Co.*, 44 Cal.3d 1103, 1112, 751 P.2d 923, 928, 245 Cal.Rptr. 658, 662-63 (1988); *see also Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal.3d 57, 62, 702 P.2d 197, 200, 216 Cal.Rptr. 115, 118 (1985) ["The purpose of any limitation statute is to require 'diligent prosecution of known claims . . . .'"]. *See* 28 U.S.C. § 2244(d)(1)(D) [stating that the limitation period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" if that is the latest event among those listed in the statute]. With regard to this diligence requirement, it is important to recognize that:

> [B]y punishing a few [habeas corpus petitioners], the limitation system benefits numerous others. Late filing has disadvantages for [habeas corpus petitioners] as well as for [the state]. Suppose, for example, that a [habeas corpus petitioner] waits ten or twenty years before [filing his petition]. Unless the [petitioner] has been lying in wait for the most advantageous time to [file his petition] . . . the [petitioner's] evidence will have deteriorated to some extent and perhaps as badly as the [state's]. Since the [petitioner] bears the burden of proof on most issues,



> any degradation in the quality of evidence generally operates to the [petitioner's] disadvantage. . . . Assuming that [petitioners], like most people, tend to procrastinate, limitation of actions may benefit [petitioners] by giving them an incentive to [file their petitions] while their claims are still fresh and, therefore, at least marginally, more likely to succeed . . . Although some [petitioners] lose their claims as a result of the limitations bar, others are stimulated to seek redress promptly, to their . . . benefit.

Ochoa & Wistrich at 490-491, footnotes omitted.

Furthermore, statutes of limitation serve the goal of preserving the integrity of the legal system. "[I]f society believes that evidence deteriorates over time, and that erroneous decisions are more likely to occur if the gap in time between underlying events and adjudication is lengthy, then statutes of limitation enhance the legitimacy of the legal system by promoting the appearance of rational decision making." Ochoa & Wistrich at 481; *see Offutt v. United States*, 348 U.S. 11, 14 (1954) ["Justice must satisfy the appearance of justice."].

Petitioner submits that the aforementioned policy considerations militate against *Saffold's* indefinite tolling rule which would effectively place habeas corpus litigation back in the pre-AEDPA period discussed in the Powell Report involving "years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law" with "[t]he resulting lack of finality undermin[ing] public confidence in our criminal justice system." U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, 1 (1989). As this Court pointed out in *MCI Telecommunications Corporation v. American Telephone and Telegraph Co.*, 512 U.S. 218, 229 (1994), "[f]or the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of

an entire toenail is insignificant; loss of an entire arm tragic." Petitioner submits that the impact on AEDPA's statute of limitations brought about by *Saffold's* alteration of AEDPA's tolling rule is akin to removing the heart of the statute because *Saffold's* indefinite tolling rule effectively eviscerates the statute of limitations.

The majority opinion in *Saffold* has improperly diluted Congress's power to define the proper scope of the writ of habeas corpus by interpreting AEDPA'S tolling provision, 28 U.S.C. § 2244(d)(2), in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407. Consequently, Petitioner respectfully requests that this Court reverse *Saffold*, thereby ensuring that Congress's intent is not thwarted.

## II.

## THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE MEANING OF "PENDING" IN AEDPA'S TOLLING PROVISION, 28 U.S.C.§2244(d)(2), BY ESTABLISHING A UNIFORM NATIONAL RULE THAT ACCURATELY REFLECTS CONGRESSIONAL INTENT

As discussed *supra* in Argument I, statutory analysis of the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), affirms the conclusion that *Saffold* has improperly diluted AEDPA's statute of limitations by interpreting the tolling provision in a manner inconsistent with congressional intent. However, this same statutory analysis supports the additional conclusion that *Nino* and the line of other circuit court cases providing for tolling during the gaps between tiers of state collateral review also have



improperly expanded tolling beyond the intent of Congress, although to a lesser degree than *Saffold*.

It is undisputed that a habeas corpus petitioner who files his federal petition one day late will be barred by AEDPA's statute of limitations. *See Green v. White*, 223 F.3d 1001, 1002-1003 (9thCir. 2000); *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999); *Rashid v. Khulmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ["The tolling provision does not . . . 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."]; *accord, Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ["A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."]; *Sorce v. Artuz*, 73 F.Supp.2d 292, 294, 297 (E.D.N.Y. 1999) [AEDPA's tolling provision "cannot revive a time period that has already expired"]; *Blouin v. Headley*, 70 F.Supp.2d 221, 223 (E.D.N.Y. 1999).

Fully aware of the arbitrary nature of statutes of limitations, Congress could not conceivably have intended for petitioner A (who is one day late filing his first state application for collateral relief and who thereafter diligently files the remainder of his state petitions and his federal petition without using any additional days) to be barred while petitioner B (who files his first state application just one day before the expiration of the federal statute and then delays weeks, months, or years between state filings [either within the time allowed by state law to submit subsequent filings, or after being granted leave to file outside the standard time period, or nunc pro tunc, or because as in *Saffold* a state court addresses the merits despite a finding of untimeliness]) is found to be timely under the statute.[11/] This

---

11. It should be noted that the unfairness of such treatment would be even greater if petitioner A had filed his first state application for collateral relief 366 days after finality of direct review and petitioner B had

would not make sense given the intent of the statute to encourage diligence on the part of petitioners in order to promote finality of state court judgments.

However, the circuit court cases rejecting the gap theory have opened the door to this very scenario in which petitioner B, who is much less diligent than Petitioner A , is nevertheless found to be timely while petitioner A is barred by the statute of limitations. *See, e.g., Nara v. Frank*, 264 F.3d at 314-319; *Melancon v. Kaylo*, 259 F.3d at 405-407; *Gibson v. Klinger*, 232 F.3d at 803-807; *Fernandez v. Sternes*, 227 F.3d at 978-981; *Swartz v. Meyers*, 204 F.3d at 420-424; *Peterson v. Gammon*, 200 F.3d at 1203-1205; *Bennett v. Artuz*, 199 F.3d 116 at 119-120; *Mills v. Norris*, 187 F.3d at 882-884; *Taylor v. Lee*, 186 F.3d at 560-561; *Nino v. Galaza*, 183 F.3d at 1004-1007; *Barnett v. Lemaster*, 167 F.3d at 1323.

In *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945), this Court recognized that statutes of limitations are created through legislation rather than judicial process, that they "represent a public policy about the privilege to litigate" and that they "are by definition arbitrary." Petitioner submits that the circuit courts' erroneous expansion of tolling beyond the intent of Congress has been the result of a noble but misguided effort to ameliorate the "harsh" consequences of AEDPA's statute of limitations. As emphasized by Ochoa and Wistrich, "[t]he limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits." Ochoa & Wistrich at 454-455. In an effort to encourage the resolution of a greater number of claims, the circuit courts unfortunately have ignored or distorted the policy judgments underlying AEDPA's statute of limitations. By

---

waited five or ten years after finality of direct review before filing his first state application for collateral relief on April 24, 1997, the last day of AEDPA's one-year grace period.



rejecting the gap theory, the circuit courts have sought to transform AEDPA's statute of limitations through judicial process and have failed to "defer to the policy judgments made by the legislative branch." Larry W. Yackle, *The Habeas Hagioscope*, 66 Southern California Law Review at 2333. In short, the circuit courts have ignored or discounted the legislative history and statutory language which strongly supports the conclusion that Congress intended to adopt the ordinary or natural meaning of the word pending and did not intend to allow tolling during the gaps between the rendering of a decision and the filing of petitions for review, appeals or additional original petitions in the course of exhausting state collateral claims.

As noted in *Robinson v. Ricks*, "[t]he most frequently cited justification for these decisions is that the principle of comity underlying the exhaustion doctrine would be undermined by refusing to toll the statute of limitations during the intervals between state court proceedings." 163 F.Supp.2d at 167. However the circuit courts' proposed justification for rejecting the gap theory is faulty because application of the gap theory would not have any negative impact whatsoever on the state courts' right to pass first on federal constitutional challenges to convictions obtained in their courts. Section 2244(d)(2) provides tolling for all of the time during which a properly filed application for state collateral review is pending before a state court. In short, AEDPA's tolling provision encourages both exhaustion and comity by requiring state prisoners to pursue state collateral review without unnecessary delay. The state prisoner's diligence in pursuing exhaustion is rewarded by tolling the entire time needed by state courts to consider the prisoner's application.

> As long as a prisoner has filed an application for post-conviction review, or for review of the denial of such an application, AEDPA provides for state courts to take all the time they need to properly decide the

> federal questions. Congress's desire to shorten the gaps between the levels of review in the state system [by motivating state prisoners to pursue state collateral review without unnecessary delay] does not violate the principle of comity underlying the exhaustion doctrine.

163 F.Supp.2d at 167.

Given the "backdrop of widely divergent state procedural rules," and given the tendency of the Ninth Circuit and other circuit courts to "stray from the principle that 'pending' means 'undecided,'" it is understandable that the federal courts to date have reached widely divergent conclusions on the meaning of "pending" under § 2244(d)(2). *Robinson v. Ricks*, 163 F.Supp.2d at 168-169. After noting the direct conflict between *Saffold* and *Fernandez*, the *Robinson* court pointed out that:

> Other circuits will toll only those periods "in which the petitioner *could have* sought an appeal under state law." *Gibson*, 232 F.3d at 803-04 & n.1; *see also Swartz*, 204 F.3d at 424; *Mills v. Norris*, 187 F.3d 881, 884 (8th Cir. 1999). The rationale here is that when a petitioner is permitted by law to file an appeal, the courts presume he is attempting to appeal. *Gibson*, 232 F.3d at 804. This is especially unpersuasive, as it equates a presumed preparation for an available appeal with a "pending" judicial proceeding, and does so even if no appeal is filed.
>
> The Seventh Circuit has yet another approach. It finds it "sensible" to deem a post-conviction motion to be "pending" during the period when it could be filed, but only if it is in fact filed. *Fernandez*, 227 F.3d at 980. The Eighth Circuit appears to have adopted the same approach in *Peterson v. Gammon*,



> 200 F.3d 1202, 1205 (8th Cir. 2000) ("The ordinary meaning of the word 'pending,' in our view, includes the entire period during which a notice of appeal from a denial of post-conviction review would be timely, assuming such a notice was in fact filed. . . ."), but that decision conflicts with its decision just five months earlier in *Mills*. *See* 187 F.3d at 884 ("[W]e conclude that the state postconviction appeal was 'pending' for purposes of § 2244(d)(2) until . . . the end of [the] ninety-day period" that petitioner was allowed to perfect his appeal under state law even though he failed to do so.).

163 F.Supp.2d at 168-169, italics in original, footnote omitted. Furthermore, a number of circuit courts have distorted AEDPA's tolling provision by superimposing § 2244(d)(1)(A)'s definition of "final" onto the definition of "pending" set forth in § 2244(d)(2). The *Robinson* court explained that one basis for its decision that tolling should not be allowed for gaps between denial of an application for state post-conviction relief and the filing of leave to appeal that denial

> is the careful distinction within § 2244(d) between a state "judgment" becoming "final," which triggers the limitations period, and a properly filed "application" being "pending," which tolls it. The former event takes into account periods in which appellate review was available, whether or not it was sought, while the latter conspicuously (and, I believe, deliberately), does not. Another reason I am unpersuaded by the cases that adopt broader interpretations of the term "pending" is that they routinely disregard that distinction. In *Swartz*, for example, the Third Circuit explicitly conflated the two terms. To define the term "pending," it applied the definition of "final," which led the court "to the conclusion that for purposes of §

2244(d)(2) 'pending' includes the time for seeking discretionary review, whether or not discretionary review is sought." 204 F.3d at 421. Indeed, this approach has spawned a body of case law that virtually substitutes the § 224[4](d)(1)(A) definition of "final" for the term "pending" in the tolling provision in § 2244(d)(2). Specifically, the Fifth, Seventh and Tenth Circuits have all held that, although post-conviction applications are "pending" between one state court's disposition and a timely filed appeal, they cease to be "pending" after the applicable period to appeal has expired. *Melancon*, 2001 WL 822453, at *4; *Fernandez*, 227 F.3d at 980; *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000). If Congress had intended such a result, it could readily have provided for tolling until state collateral review becomes "final, by the conclusion of such review or the expiration of the time for seeking such review. Alternatively, it could have defined "final" by reference to "the final state court disposition of such petition," as it did in § []2263(b)(2) for capital habeas petitions. Rather Congress provided for tolling only while a specific, filed application for collateral review is "pending." Its failure to use the terminology of either § 2244(d)(1)(A) or § 2263(b)(2), and its use of the unambiguous word "pending" instead, requires the narrower construction of the tolling provision that I employ here.

163 F.Supp.2d at 167-168.

In *Nara v. Frank*, the Third Circuit has further muddied the waters by first following *Swartz's* holding that "pending" for purposes of § 2244(d)(2) "'includes the time for seeking discretionary review, whether or not discretionary review is sought'" and later reasoning that tolling should not be granted for the 14-day period during which the petitioner could



have but did not seek reconsideration by the Pennsylvania Supreme Court. 264 F.3d at 317-319. The *Nara* court explained the disparity as follows:

> It is true that some language in our . . . decision in *Swartz* seems to suggest a different result. . . . But *Swartz* specifically dealt with the time in which a petition for allowance of appeal could be brought to the Pennsylvania Supreme Court. We recognized that this period must be counted in the tolling analysis because a contrary holding would force a petitioner to file a habeas petition before exhausting state remedies. *See [Swartz*, 204 F.3d] at 422. The same is not true for the 14-day period to file a motion for reconsideration. Once the Pennsylvania Supreme Court denies review the first time, the state prisoner may file a habeas petition in federal court; s/he obviously need not file a motion for reconsideration in order to exhaust the state remedies. Therefore, the principles of comity that guided our holding in *Swartz* do not apply in Nara's case.[12/]
>
> As we noted in *Stokes* [*v. District Attorney of the County of Philadelphia*, 247 F.3d 539 (3d Cir. 2001)], § 2244(d)(2) uses the terms "properly filed" and "pending." *See* 247 F.3d at 543. If Nara had indeed filed a motion for reconsideration, that motion would be "pending" in the Pennsylvania Supreme Court

---

12. For a conflicting view, see *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) holding that tolling should be granted for an additional 30 days after the California Supreme Court's denial of petitioner's state petition for habeas corpus because, under the Ninth Circuit's interpretation of Rule 24 of the California Rules of Court, "a denial of a habeas petition within the California Supreme Court's original jurisdiction is not final for 30 days (and therefore is subject to further action during that time)."

> until it was decided by that court. However, because Nara did not file a motion to reconsider, nothing was "properly filed" or "pending." Therefore, we reject Nara's argument that the 14 days during which he could have filed a motion to reconsider should have been counted to toll the one-year statute of limitations under § 2244(d).

264 F.3d at 319.

Although *Nara* correctly determined that no tolling should be granted for the 14-day period allowed for reconsideration because "nothing was 'properly filed' or 'pending,'" Petitioner submits that *Nara* and *Swartz* erred by reasoning that petitioners should be granted tolling for the period they had available to seek discretionary review in the state supreme court despite their failure to file applications for such discretionary review. The flaw in the reasoning is that it is based upon the faulty premise that disallowance of tolling for unfiled state applications for discretionary review would force petitioners to file federal petitions before exhausting their state remedies. While it is true that such unexhausted federal petitions would be dismissed under *Rose v. Lundy*, 455 U.S. 509, 522 (1982) for failure to exhaust, Petitioner submits that the disallowance of tolling for unfiled state applications would not force petitioners to file federal petitions. Rather, just as Congress intended, the disallowance of tolling for unfiled state applications would provide a strong incentive for petitioners to diligently file their state applications, thereby enabling them to exhaust their state remedies in a timely manner and pave the way for timely and fully exhausted federal petitions.

In addition to the confusion created by the circuit courts' conflicting holdings on tolling, the circuit courts' rejection of the gap theory has also created the potential for widely divergent grants of tolling due to the diversity of state procedural rules and statutes. A survey of the circuit court cases rejecting the gap theory reveals that the potential amount of time



available under state law to file for review of denials of habeas applications ranges from as low as no time at all or just 10 days depending on the level of "review" in California, *see Nino*, 183 F.3d at 1006, fn.2 and 3, to periods of up to 18 months or more in Arkansas, *see Mills v. Norris*, 187 F.3d at 883-884.[13] Other states provide varying periods to file appeals, applications seeking leave to appeal, motions for belated appeals, motions for reconsideration or rehearing, motions for extension of time to appeal, etc. *See*, *Barnett v. Lemaster*, 167 F.3d at 1323 [30 days under New Mexico law]; *Peterson v. Gammon*, 200 F.3d at 1203 [41 days from trial court denial of post-conviction relief to appeal of the denial was tolled because the appeal was timely under Missouri state law]; *Swartz v. Meyers*, 204 F.3d at 419-420, 424-425 [30 days under Pennsylvania law to file a timely petition for allowance of appeal in the state supreme court tolled whether or not review actually sought and leaving unresolved whether or not tolling should be allowed for the time until the state supreme court rejected petitioner's request for allowance

---

13. In *Nino*, the Ninth Circuit concluded that tolling should be allowed "for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies" (which in that case included a gap of 43 days between the superior court denial of Nino's first petition for state collateral relief and his subsequent original petition for state collateral relief filed in the state court of appeal) despite the fact that California law did not provide for an appeal of the superior court's denial of the first habeas petition and instead provided for the filing of a second original petition in the intermediate appellate court. 183 F.3d at 1004, 1006. In *Mills*, Arkansas state law provided for a 90-day period to file the record on appeal, but also permitted the trial court to extend the time to file the record on appeal up to 7 months and allowed the state supreme court up to 18 months to entertain motions for belated appeals. The *Mills* court held that AEDPA's one-year limitations period was tolled until the end of the 90-day period for perfecting the state court appeal, even though the petitioner did not perfect such an appeal, and it left unresolved whether or not the Arkansas appellate rules providing for 7-month extensions to file the record on appeal and for consideration of belated appeals 18 months after the decision appealed from could also give rise to tolling under AEDPA. 187 F.3d at 882-884.

of appeal nunc pro tunc]; *Fernandez v. Sternes*, 227 F.3d at 978-979 [21 days to file petition for leave to appeal under Illinois law]; *Gibson v. Klinger*, 232 F.3d at 802 [30 days to appeal under Oklahoma law]; *Melancon v. Kaylo*, 259 F.3d at 404 [30 days to request review of trial court determination under Louisiana law].

If the various circuit court decisions rejecting the gap theory are allowed to stand, there will be a wide disparity of tolling results with some petitioners receiving additional weeks, months and even years of tolling that will not be available to petitioners in other states and that was not intended by Congress. This wide disparity of tolling results will be determined in the final analysis by the vagaries of state procedural rules and laws and by the inaction of the petitioners themselves as facilitated by liberal state filing rules in their particular states. Furthermore, if the circuit court cases rejecting the gap theory are allowed to stand, the disparity in tolling results across the county could actually become worse over time if some states enact new laws or rules providing for longer periods of review/appeal/reconsideration etc., thereby further undermining the intent of Congress.

This Court recognized in *Shepherd v. Thompson*, 122 U.S. 231 (1887), that "'[t]he statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.'" *Id.* at 236, quoting Chief Justice Marshall in *Clemenston v. Williams*, 12 U.S. (8 Cranch) 72, 74 (1814). Petitioner submits that this Court should overrule the circuit court decisions rejecting the gap theory because they inappropriately have allowed state procedural rules and statutes to in effect define the meaning of "pending" in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). As previously discussed, Petitioner submits that the determination of the meaning of "pending" is a matter of federal law requiring a determination of the intent of Congress and that such a determination should not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state



procedural rule or statute.

In *Lonchar*, this Court recognized that there has been an extended debate in Congress over a statute of limitations for federal habeas cases with "more than 80 bills that have proposed a statute of limitations for federal habeas cases since *Vasquez* [*v. Hillery*, 474 U.S. 254 (1986]." 517 U.S. at 328.[14] Significantly, with regard to the debate over federal Habeas Corpus Rule 9(a) concerning delayed petitions, the *Lonchar* court recognized

> the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process. *See Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.ED.2d 598 (1986) ("[D]espite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. We should not lightly create a new judicial rule . . . To achieve the same end") (citation omitted) . . .

517 U.S. at 328. In light of the fact that Congress has now acted by enacting AEDPA's statute of limitations, Petitioner submits that this Court should overrule the ad hoc judicial exceptions to AEDPA's statute of limitations which have been created by the circuits to support their rejection of the gap theory. These ad hoc judicial exceptions cannot be allowed to stand because they do not defer to the policy judgments of Congress and have resulted in a dilution of Congress's power to define the proper scope of habeas corpus.

In *Lonchar*, this Court recognized the importance of establishing a uniform national rule to guide the lower courts.

---

14. *See* 517 U.S. at 333-334 for an appendix to the opinion of the court listing the bills.

> [T]his Court in *McCleskey* [*v. Zant*, 499 U.S. 467 (1991)], also reaffirmed the importance, "'in order to preclude individualized enforcement of the Constitution in different parts of the Nation,'" of "'lay[ing] down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.'" *Id.*, at 496, 111 S.Ct., at 1471 (quoting *Brown v. Allen*, 344 U.S. 443, 501-502, 73 S.Ct. 437, 443, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.)).
>
> After all, equitable rules that guide lower courts reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in "finality" such rules often further. [Citations omitted.]

*Lonchar v. Thomas*, 517 U.S. at 323-324.

Petitioner submits that this Court should resolve the conflict over the meaning of "pending" in AEDPA's tolling provision 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent. For the reasons discussed above, Petitioner submits that the gap theory most accurately reflects the intent of Congress. By recognizing that the gap theory most accurately represents congressional intent to toll the statute of limitations only when properly filed applications are pending before a state court and not during the period following decision at one level and the filing of an application for review at another level, this Court can prevent the lower federal courts from diluting Congress's power to define the proper scope of the writ of habeas corpus and can provide a uniform national rule that reflects the intent of Congress. Furthermore, a uniform national rule based upon



the ordinary and natural meaning of pending (as set forth in the gap theory) will facilitate consistency of application and enable petitioners and courts alike to easily determine the appropriate amount of tolling available in each case. Because the narrow definition of "pending" intended by Congress and implemented in the gap theory does not depend on the vagaries of state procedural law, it is easier to apply and understand than the definition adopted by the circuit courts rejecting the gap theory. Given that protective suits are more likely to be filed by petitioners who are unsure about the nature of the statute of limitations and its tolling rules, adoption of a uniform national rule based upon congressional intent as reflected in the gap theory should minimize the filing of protective suits.[15/]

---

15. If this Court decides not to implement the gap theory, Petitioner requests that this Court consider establishing a bright line rule that provides as little tolling between gaps as is possible, for example 30 days between properly filed applications. Petitioner submits that a bright line tolling rule should toll no more than 90 days between each state court filing without a showing of improper state action that would justify further tolling. Although these possible bright line rules would not reflect congressional intent as accurately as the gap theory, at least they would avoid the uncertainty and lack of uniformity created by the circuit court decisions rejecting the gap theory.

## CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court reverse *Saffold* and reinstate the district court's dismissal of Respondent's application for writ of habeas corpus. Petitioner further requests that this Court resolve the circuit conflict over the meaning of "pending" set forth in AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), by establishing a uniform national rule that accurately reflects congressional intent.

Dated: November 27, 2001

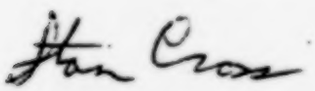
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

ARNOLD O. OVEROYE
Senior Assistant Attorney General



STAN CROSS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

SC:sc/lbj
SA2001US0003